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No. 94-5707

In The

Supreme Court of the United States

October Term, 1994

SHARLENE WILSON,

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

On Writ Of Certiorari
To The Arkansas Supreme Court

PETITIONER'S REPLY BRIEF

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March 17, 1995

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ARGUMENT

I. AT BEST, A BALANCING OF INTERESTS ANALYSIS RESULTS IN THE BALANCE TIPPING IN FAVOR OF A CONSTITUTIONAL REQUIREMENT OF ANNOUNCEMENT.

A. The State's argument is premised on flawed assumptions.

The State's argument ultimately flows from three erroneous assumptions: (1) a citizen's "privacy interests are only slightly advanced by a knock-and-announce rule" (Resp.Brief at 15-16); (2) a balancing of interests already performed by the magistrate has decided that the citizen's privacy interest is to be ceded to the police for the purposes of the entry and search (*id.* at 10-17); and (3) the police are never wrong and never search the wrong house in boldly stating that a civil remedy is the sure cure for any violation of the knock-and-announce rule (*id.* at 32).

The privacy in one's home is the highest right known in American law. Nevertheless, the State here attempts to belittle this right at every turn in its brief in the name of "reasonableness" and the "war on drugs." In the process of balancing and overall reasonableness, however, its choice of what it weighs helps it arrive at its preconceived answer.[1]

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[1] *United States v. Rabinowitz*, 339 U.S. 56, 68-69 (1950) (FRANKFURTER, J., dissenting) (bracketed material added):

> It is true also of journeys in the law that the place you reach depends upon the direction you are taking. And so, where one comes out on a case depends on where one goes in. It makes all the difference in the world whether one approaches the Fourth Amendment as the Court approached it in [*Boyd, Weeks, Silverthorne,* and *Gouled*], or one approaches it as a provision dealing with a formality. It makes all the difference in the world whether one recognizes the central fact about the Fourth Amendment, namely, that it was a safeguard against

> [T]he Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable. . . . What is reasonable, of course, "depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself." . . . Thus, the permissibility of a particular practice "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."

Skinner v. Railway Labor Executives Asso., 489 U.S. 602, 618 (1989).

Even *Dalia v. United States*, 441 U.S. 238 (1979), is not as all-inclusive as the State says when it states that executing officers have the discretion to determine how to execute a search warrant. Indeed, Officers are still subject to the Fourth Amendment's reasonableness requirement.[2]

B. The important interests served by the common law knock-and-announce rule.

The knock-and-announce rule is not some revolutionary concept or some impediment erected to stall the State's "war on drugs." The knock-and-announce rule was around long before drugs. (It is highly ironic that one petty drug dealer's case is our government's vehicle to seek to nullify 720 years

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recurrence of abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution, or one thinks of it merely as a requirement of a piece of paper.

[2] *Dalia, supra*, at 257: "Nothing in the language of the Constitution or in this Court's decisions interpreting that language suggests that, in addition to the three requirements discussed above, search warrants also must include a specification of the precise manner in which they are to be executed. On the contrary, it is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant—subject of course to the general Fourth Amendment protection 'against unreasonable searches and seizures.'"

of the common law.)

The question here ultimately is whether this part of the common law is subject to being nullified in the name of law and order. The choice was made for us when the Constitution and the Bill of Rights were adopted; not by the police in fighting the "war on drugs."

The State belittles the salutary and decidedly important purposes of the rule of protection of privacy, property, and life of all concerned. Does the knock-and-announce rule only "slightly advance[]" privacy? Resp.Brief at 15-16. Privacy is not so easily quantified and diminished solely by state action. The Fourth Amendment protects people and their expectations of privacy and not places. *Katz v. United States*, 389 U.S. 347, 351 (1967). Once there is a Fourth Amendment expectation of privacy, there is no de minimis rule on whether it exists. After all, "[a] search is a search, even if it happens to disclose nothing." *Arizona v. Hicks*, 480 U.S. 321, 325 (1987).

C. Whose protection is more important? Officers, innocent citizens, or both?

The State goes to great extremes to show that the protection of police officers should be the Court's only concern in whether there should be a knock-and-announce rule. Its myopic law enforcement-protectionist view of what purposes the Fourth Amendment serves in the overall scheme of American life causes it to read "protection of life" as "protection of police." What about the innocent citizens of this country? Do the police *never* make mistakes when they execute drug search warrants? Hardly.

1. Protection of Innocent Citizens

It is settled that the Fourth Amendment protects the law-abiding as well as the law breaker. *See, e.g., Weeks v. United States*, 232 U.S. 383, 392 (1914); *Go-Bart Importing*

Co. v. United States, 282 U.S. 344, 357 (1931); *Kimmelman v. Morrison,* 477 U.S. 365, 374 (1986). This concept and protection against mistakes and the rights of innocent third persons is an integral part of the policy underlying both the knock-and-announce rule; *Miller v. United States,* 357 U.S. 301, 314 (1958); *Ker v. California,* 374 U.S. 23, 33 (1963); and the particularity requirement. *United States v. Chadwick,* 433 U.S. 1, 9-10 (1977). Nowhere in the Fourth Amendment, however, is protection of the innocent more important than right here because of the nature of the intrusion and the governmental admissions throughout the briefs in this case that force and violence will be used in drug searches.

The State would have us believe, however, that police officers never make mistakes in deciding not only whose property to search but how to do it, so protection of the innocent serves no purpose as it balances away the "right of the people to be secure."

The nature of criminal cases is such that few cases come to this Court where the wrong place was searched.[3] There are a few civil cases in the lower courts involving searches of the wrong place, but they show that there is no effective civil remedy. *See* Part VI, *infra.*

But, what about innocent citizens who are victims of overzealous police officers executing warrants without warning? The State apparently pretends that this problem either does not exist or it is of no constitutional consequence. It is real, it effects the innocent more than the guilty, and the empirical data cannot be ignored:

> The Fourth Amendment also influences how police may conduct searches. As early as 1603, English courts recognized that law officers were obliged to knock and announce their purpose before entering a private citizen's home. . . .
>
> Unfortunately, contemporary law enforcement practices have turned back the clock to an era prior to the landing of the *Mayflower*. Police now routinely use battering rams to conduct surprise raids. In Atlanta, in November 1991, local police battered down a suspected drug dealer's apartment door and shot and killed an eight-year-old boy (Xavier Bennett, Jr.) in the resulting cross fire. . . . In 1991 Garland, Texas, police dressed in black and wearing black ski masks[4] burst into a trailer, waved guns in the air, and kicked down the bedroom door where Kenneth Baulch had been sleeping next to his seventeen-month-old son. A policeman claimed that Baulch posed a deadly threat because he held an ashtray in his left hand, which explained why he shot Baulch in the back and killed him. (A police internal investigation found no wrongdoing by the officer.) In March 1992 a police SWAT team killed Robin Pratt, an Everett, Washington, mother in a no-knock raid carrying out an arrest warrant for her husband. (Her husband was later released after the allegations upon which the arrest warrant were based turned out to be false.) The *Seattle Times* summarized the police raid:
>
> Instead of using an apartment key given to them, SWAT

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[3] One ready example is *Maryland v. Garrison,* 480 U.S. 79 (1987) (officers entered the wrong apartment, but it was objectively reasonable given the configuration of the apartment building, the independent investigation as to how many tenants there were in the building, the lack of objection from the occupants who were present during the search, and the fact the officers immediately exited when they learned they were in the wrong one).

[4] Note that the State argues that early untrained constables could not readily be identified by citizens, so the common law rule was entitled to be more restrictive. Resp.Brief at 20, 23. However, today's drug raids are often conducted by black-dressed "ninja narcs," with their faces covered like robbers, or by plainclothed narcotics officers. Narcotics officers hardly ever have uniform officers around except as backup. That even happened here. The net result is that the raiding party may easily be misidentified as robbers. That recently happened in Little Rock. *See* text accompanying note 7, *infra.*

members threw a 50-pound battering ram through a sliding-glass door that landed near the heads of Pratt's 6-year-old daughter and 5-year-old niece. As [policeman] Aston rounded the corner to the Pratts' bedroom, he encountered Robin Pratt. SWAT members were yelling, "Get down," and she started to crouch onto her knees. She looked up at Aston and said, "Please don't hurt my children." . . . Aston had his gun pointed at her and fired, shooting her in the neck. According to Muenster, she was alive another one to two minutes but could not speak because her throat had been destroyed by the bullet. She was handcuffed, lying face down.

Citizens are prosecuted for defending themselves or their homes against plainclothes policemen conducting no-knock raids. In 1986 William Grass of Kentucky was sentenced to two years in prison for firing a bullet through a door and wounding a SWAT team officer who was forcibly entering his residence late at night without knocking in order to search his house. A Boston narcotics agent was shot and killed by a citizen as he and other policemen tried to batter down Albert Lewin's door in a no-knock raid in 1989. The government sought to prosecute Lewin for murder but a judge threw the case out after a policemen admitted he lied in order to get the search warrant to conduct the raid.[5]

At 2:00 a.m. on January 25, 1993, police smashed down the door and rushed into the home of Manuel Ramirez of Stockton, California. Ramirez awoke, grabbed a pistol, and shot and killed one policeman by his bedroom door before other police killed him. The police were raiding the house based on a tip that drugs were on the premises, but they found no drugs. . . .

In 1989 Titusville, Florida, policemen conducted a night-time no-knock drug raid on the home of fifty-eight-year-old painter Charles DiGristine. The raid began as the police set

[5] *See Commonwealth v. Lewin*, 407 Mass. 617, 555 N.E.2d 551 (1990), earlier opinion 405 Mass. 566, 555 N.E.2d 557 (police officers lied about informant to get search warrant).

off a concussion grenade and then smashed through DiGristine's front door. DiGristine's wife screamed; he hurried to his bedroom to get a pistol; a man dressed in dark clothing and a black mask crashed into his bedroom; gunfire was exchanged; and the policeman was fatally wounded. The local government prosecuted DiGristine for first-degree murder, but a jury acquitted him. (The police believed—based on bogus information from a single anonymous information—that the DiGristine home was a center for heavily armed drug dealers; the only drug they found in the raid was a small amount of marijuana owned by DiGristine's sixteen-year-old-son.)

. . . DEA agents used an ax to break down the door of an innocent Guthrie, Oklahoma, man in 1991 and then handcuffed and kicked the man in front of his wife and daughters before they realized they were at the wrong address; the agents left without apologizing. The *San Diego Tribune* noted in 1992, "In July, an informant bum tip led San Diego police to storm a Logan Heights home. The residents say their daughters were subjected to genital searches while a gun was held to the head of their 6 year old son. No drugs were found."

On August 25, 1992, Customs Service officials and local police raided the San Diego home of businessman Donald Carlson, setting off a bomb in his backyard, smashing through his front door, and shooting him three times after he tried to defend himself with a gun. Police even shot Carlson in the back after he had given up his gun and was lying wounded on his bedroom floor. The Customs Service believed that there were four machine guns and a massive cache of illegal narcotics in Carlson's home. Carlson related in congressional testimony in 1993 that even after agents failed to find any drugs, "No one offered me medical assistance while I lay on the floor of my bedroom. . . . Eventually, paramedics arrived, and took me to the hospital. I was kept in custody under armed guard and shackled for several days at the hospital. During that time, I was aware of hospital personnel referring to me as a criminal, of police officers and agents coming into my room, and the like." The raid was launched based on a

tip from a paid informant named Ron, who later told the *Los Angeles Times* that he had never formally identified any specific house to be searched. (The DEA had previously dealt with Ron and considered him unreliable.) Customs officials had the home under surveillance for many hours before they launched their raid; even though they got a search warrant based on their assertion that the house was a vacant drug storehouse, the raid was carried out even after it became obvious that Carlson was living a normal life there. The agents could easily have arrested Carlson when he arrived home at 10:00 p.m. but instead watched and waited to attack until after midnight, when Carlson was asleep, in order to maximize the surprise. . . . Carlson surmised that his house was raided in part because federal agents hoped to seize it under asset forfeiture provisions: "That kind of financial incentive may well have played a real role in the conduct of federal agents in raiding my home and in ignoring every sign that day that they were in the wrong place." A *San Diego Union-Tribune* analysis of the raid concluded that it occurred partly as a result of "heavy pressure from Customs managers—who stand to gain professionally by generating arrests and big caseloads—on street agents to produce headline-grabbing cases."[6]

J. BOVARD, LOST RIGHTS 234-37 (1994) (footnotes omitted; bracketed footnotes added). A less detailed litany citing some of the same occurrences and others appears in Note, *The Knock and Announce Rule: A New Approach to the Destruction of Evidence Exception*, 93 COLUM.L.REV. 685, 705 (1993).

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[6] Carlson's case is also discussed in M. Curriden, "Informer's Lies Trigger a Tragedy," *Nat'l L.J.*, March 6, 1995, A1, A25 (it took nearly a year and a half for the government to admit its error and settle with him).

The *National Law Journal* just completed a three-part series (running in its issues of February 20 & 27 and March 6, 1995) called "The Informant Trap" on how government has relied too heavily on lying informants or even on totally fictional informants in the "war on drugs."

> Over one hundred newspaper articles, reproduced in the Congressional Record described a repeated scenario: terrified citizens, thinking themselves targets of burglary or more frightening acts, discovered that they were instead being searched by law enforcement officers ho had entered their homes without notice. In an exhaustive eight-week investigation by the *New York Times*, consisting of interviews with victims of "no-knock" raids, reporters found that "[i]nnocent Americans around the country have been subjected to dozens of mistaken, violent and often illegal police raids by local, state and Federal narcotics agents in search of illicit drugs and their dealers."

Note, *supra*, at 705, citing A. Malcolm, "Violent Drug Raids Against the Innocent Found Widespread," *N.Y. Times*, June 25, 1973, at A1, A22.

2. Protection of Officers

What about protection of the officer? The State argues that FBI "statistics bear out that Arkansas' procedures maximize officer safety. From 1980 to 1993, no Arkansas police officers were killed investigation drug-related offenses or executing search warrants." Nationally, however, 16 officers were killed in that 14 year period. Resp.Brief at 13-14 n.7. The State's brief was filed February 23, 1995.

On February 7, 1995, a Little Rock Police Officer was killed and another shot in the head during a "routine drug raid" when they were shot by a homeowner claiming he was only defending himself when his door burst open without warning.[7] The shooter in that case, Willie L. Green, was a victim of an armed robbery of his apartment just a month

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[7] J. Kordsmeier, "LR officer slain, 2nd shot at door in drug search," *Arkansas Democrat-Gazette*, Feb. 8, 1995, at 1A, 8A; C. Reinolds & J. Sandlin, "'He was ready,' police chief says of alleged killer," *Arkansas Democrat-Gazette*, Feb. 9, 1995, at 1A, 10A; M. Leverett, "Dying for Evidence," *Arkansas Times*, March 3, 1995, at 10-11.

earlier,[8] and the raiding officers were aware of it.[9] The officers, as to be expected, claimed that they announced their presence.[10] Green, however, immediately claimed that he never heard the officers identify themselves, he was only defending himself, and he had plenty of justification to fear for his own safety. The official police version would have us believe that Green shot deliberately to protect his small stash of marijuana while two small children were in the same room. LRPD admits that it *daily* uses the tactic of announcing when the officers hit the door just for surprise, not before,[11] just like in this case. This is just the first time an officer got shot.

So, just how safe is it to announce in the midst of the entry when the banging down the door drowns out the voices of the officers telling the occupant their identity and purpose?

D. *Curtis' Case* and the common law understanding supports applying the rule under the Fourth Amendment.

Respondent finds *Curtis' Case*, 1 Fost. 135, 168 Eng. Rep. 67 (K.B.1757), a "poor example of [*Semayne's*] rule's operation" and a "tenuous foundation" for the knock-and-announce rule. Resp.Brief at 21. To the contrary, *Curtis' Case* is compelling on the common law issue: Knowing the consequences of the death of an officer serving the warrant, the rule was still incorporated into American law. If anything, that case underscores the common law understanding of the purpose of the rule in protection of life.

[8] In footnote 48 of Petitioner's Brief, she notes a January 21, 1995 Little Rock news article which relates to this robbery of Green (showing it on a front page map) and an LRPD officer's admonition to shoot to kill those who enter homes by force.

[9] *See* articles in note 7, *supra*.

[10] After all, how could they make a capital murder charge stick against Green?

[11] M. Leverett, *supra*, at 11.

II. THE DECISION TO ISSUE A WARRANT NEVER ENDS THE INQUIRY AS TO WHETHER THE FOURTH AMENDMENT IS VIOLATED; IT IS ONLY ONE PRONG OF THE FOURTH AMENDMENT INQUIRY. REASONABLENESS IS ALWAYS AN ISSUE.

The State argues that once the decision to issue a warrant has been made, all the rights of the individual take a back seat to the rights of the government to conduct a search. This overlooks the fundamental reasonableness requirement of the Fourth Amendment. The way a warrant is executed is always at issue. *See, e.g., Winston v. Lee*, 470 U.S. 753, 759 (1985) (the proposed search by surgery would be unreasonable even if it would produce evidence of crime; some rights are higher than the state's interest in obtaining evidence of crime); *Zurcher v. Stanford Daily*, 436 U.S. 547, 559-60 (1979). *See also Terry v. Ohio*, 392 U.S. 1, 28 (1968) ("The manner in which the [search] . . . [was] conducted is, of course, as vital a part of the inquiry as whether [it was] warranted at all."); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 687 (1989) (the invasive nature of urine testing could make is unreasonable in some cases when the nature of the invasion is balanced against its need). *Cf. Welsh v. Wisconsin*, 466 U.S. 740 (1984) (although warrantless entry would produce evidence of drunk driving, officer cannot enter driver's home in hot pursuit in a misdemeanor case).

III. THE PROPOSED BLANKET RULE VIOLATES THE PROBABLE CAUSE REQUIREMENT OF THE FOURTH AMENDMENT. THERE MUST BE OBJECTIVE FACTS SUPPORTING INVOKING AN EXCEPTION.

The respondent and all its *amici* seek a blanket rule exempting drug searches from the reach of the knock-and-an-

nounce rule. They seek to turn the "possible destruction of evidence" exception, which petitioner concedes the common law recognizes, into the "drug exception" or the "indoor plumbing exception" to the knock-and-announce requirement. Without a *factual* basis for believing that there is a reason to invoke an exception under the totality of the circumstances, a blanket rule would be unreasonable.

A. This is not the case to decide this issue.

This case is here on the narrow question of whether the common law knock-and-announce rule is a part of the Fourth Amendment. The State here never relied on any exceptions below, and the record is less than clear on whether exceptions would apply, unless the blanket rule is adopted. Here, the State necessarily has to rely on the blanket exception since the officers executing the warrant never expressed any concern that any evidence would be destroyed and they possessed no information at all that there was any possibility of destruction of evidence.[12] If the State relies on the risk of violence because of the alleged threat on the informant and presence of the gun, why did they not have their own weapons drawn when they entered?

One case to likely resolve that issue is waiting in the wings in *Stevens v. Wisconsin,* petition for cert. pending, No. 93-9026, where the Wisconsin court held that there was a drug case exception to the knock-and-announce requirement. *State v. Stevens,* 181 Wis.2d 410, 511 N.W.2d 591, 594-96 (1994). If Petitioner prevails on the constitutional question here, *Stevens'* issue will still be open to question.

[12] Also, it should be remembered that the officers had warrants for petitioner's arrest for the class Y and C felonies of delivery of methamphetamine and marijuana. The officers were seeking possible stashes of methamphetamine and marijuana from which she could have delivered the drugs. Also, the officers were seeking the gun allegedly used to threaten the informant. Curiously, petitioner was never charged with being a felon in possession of a firearm for allegedly carrying the gun, but her husband was. She was charged with terroristic threatening of the informant, but that charge simply disappeared.

B. There should be objective evidence under the totality of circumstances to invoke an exception.

If the Court must reach this issue, it should be noted that granting law enforcement officers "engaged in the often competitive enterprise of ferreting out crime"[13] leads to great mischief and has overwhelming potential for abuse in the area of knock-and-announce. *See* Point I.C.1., *supra,* and Point V.B., *infra.*

Of the three exceptions to the knock-and-announce requirement, the potential for violence will usually be known in advance and provided to the magistrate in the warrant application. After all, a weapon in close proximity to drugs is a separate federal crime with a five year mandatory minimum sentence. 18 U.S.C. § 922(c)(1). It thus behooves the officer to include such information in the affidavit for the warrant. Indeed, such information was provided here, even though it apparently lacked all credibility.

In Arkansas at least, the potential for destruction of evidence is included in a request for a nighttime search under Ark.R.Crim.P. 13.2(c) (1993), and a specific need for a nighttime search must be shown by probable cause. *See* Petr's Brief at 24 n.7. Officers will often know about the potential for destruction of evidence in advance, but circumstances at the time of the search, such as suspicious sounds indicating potential destruction of evidence, could provide justification for an immediate entry without giving the home-

[13] *Johnson v. United States,* 333 U.S. 10, 14 (1948), quoted in *United States v. Leon,* 468 U.S. 897, 914 (1984), and *Illinois v. Krull,* 480 U.S. 340, 351 (1987), and cited in *Arizona v. Evans,* 1995 U.S. Lexis 1806, *27.

owner the opportunity to surrender his privacy to the warrant.

The useless gesture exception can arise at the time of execution of the warrant, but it can also be known in advance, where, for example, the suspect is in custody or out-of-town and the officers have no reason to believe that anyone is at home.

C. What justification must be provided?

At any rate, what is the justification that the officers will have to provide in the warrant application or post hoc to justify invoking an exception? The probable cause standard of *Illinois v. Gates*, 462 U.S. 213 (1983), with its totality of circumstances test readily comes to mind and would be the easiest to apply and still protect the rights of innocent citizens. Without such a standard, any blanket rule would violate the protection against unreasonable searches embodied in the first clause of the Fourth Amendment.[14]

IV. THE INEVITABLE DISCOVERY EXCEPTION DOES NOT APPLY.

The State's and its *amici's* arguments concerning application of the inevitable discovery exception completely overlook the concept of reasonableness of any search and seizure. So the argument goes: "A warrant has been issued. Therefore, we would find the sought-after evidence no matter how we violate the Fourth Amendment in the process of execution of the warrant." Inevitable discovery has nothing to do, however, with the rights of innocent citizens who are subjected to a violation of their right to announcement. To invoke the exception presupposes a constitutional violation.

[14] "The right of the people to be secure in their . . . houses . . . against unreasonable searches and seizures, shall not be violated . . . ."

See, e.g., Murray v. United States, 487 U.S. 533, 539 (1988); *Nix v. Williams*, 467 U.S. 431, 444 (1984); *United States v. Crews*, 445 U.S. 463, 471 (1980).

The State seeks to gloss over the argument that the "but for" test of inevitable discovery has no application here; the premature entry is not the "but for" of the finding of the evidence. This argument proves too much, because the State wants it both ways. It says that the search cannot be successfully completed without dispensing with announcement because the person whose property is being searched would flush the drugs. If so, then dispensing with announcement is, in fact, a "but for" cause of finding the drugs, and that is, in further fact, the motive for not announcing. Therefore, the State's claim of inevitable discovery inevitably contradicts the claim of exigent circumstances.

V. THE GOOD FAITH EXCEPTION SHOULD NOT BE APPLIED UNDER *KRULL* AND *EVANS*.

Petitioner never seeks to invoke the exclusionary rule in this Court. We only seek a remand to the Arkansas Supreme Court to resolve that issue. The State and *amici*, however, seek to invoke the good faith exception of *Illinois v. Krull*, 480 U.S. 340 (1987), to sustain the search.

This case falls within an "exception" to the good faith exception, so it should not be applied.

A. The constitutionality of the knock-and-announce rule must still be decided first.

The good faith exception cases make it clear that the basic constitutional issue should be decided first. *United States v. Leon*, 468 U.S. 897, 924 & n. 25 (1984); *Krull, supra*, at 353-54.

B. The pattern of abuse of the knock-and-announce requirement precludes adoption of the good faith exception.

On the surface, the good faith exception has great appeal in this case, and *Krull* seems to control. After all, the Arkansas Supreme Court adopted the rule, and Arkansas courts have previously rejected any knock-and-announce requirement. Nevertheless, the known abuses of the knock-and-announce requirement recounted in Part I.C.1., *supra,* demonstrates that the inherent potential for lawlessness of the police in knock-and-announce cases precludes application of the good faith exception.

All the good faith exception cases starting with *Leon, supra,* at 916[15] & n.14. and continuing on to *Krull, supra,* at 351,[16] and *Arizona v. Evans,* 1995 U.S. Lexis 1806, *26,[17] hold that abuses of power of the person to be "deterred" can justify not invoking the good faith exception. This is precisely the kind of case envisioned in those cases for not applying the good faith exception.

The policies underlying the knock-and-announce requirement are substantial. Petr's Brief at 57-63. The risks of error, however, are too great in the numbers of innocent persons subjected to searches of their property and invasions of their privacy. In addition, the consequences of error are substantial, and they can even be fatal in the numbers of persons physically harmed by a failure to properly announce.

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[15] "[T]here exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion."

[16] "Thus, we are given no basis for believing that 'lawlessness among these actors requires application of the extreme sanction of exclusion.' *United States v. Leon,* 468 U.S., at 916.

[17] "[R]espondent offers no evidence that court employees are included to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion. See *Leon, supra* at 916, and n. 14; see also *Krull, supra* at 350-351."

Some state cases have held that the knock-and-announce requirement is not subject to the good faith exception. *People v. Neer,* 177 Cal.App.3d 991, 223 Cal.Rptr. 551, 561 (4th Dist.1986); *State v. Sakkelson,* 379 N.W.2d 779, 784-85 (N.D.1985).

VI. THERE IS NO VIABLE CIVIL REMEDY FOR VIOLATIONS OF THE KNOCK-AND-ANNOUNCE RULE.

Those who want to do away with the exclusionary rule often cite the existence of a potential civil remedy.[18] *See* Resp.Brief at 32,[19] Calif.Am.Brief at 21. Even the "Contract on America" includes a civil remedy on its unconstitutional repeal of the exclusionary rule in warrantless searches. S. 3, § 507 (104th Cong., 1st Sess.).

This is, at best, a disingenuous argument for two reasons. First, the State argues that there is no constitutional right involved in a failure to announce. If so, there can be no civil action. Second, those who litigate in this area know that there is no viable civil remedy, even for the innocent victims of government excess. The case law under *Maryland v. Garrison* already holds that there is no civil remedy for searching the wrong house unless the officers virtually knowingly do so, thereby sacrificing their qualified immunity. *See, e.g., Richardson v. Oldham,* 12 F.3d 1373 (5th Cir. 1994); *Samuels v. Smith,* 839 F.Supp. 959 (D.Conn.1993); *Linley v. DeMoss,* 83 Ohio App.3d 594, 615 N.E.2d 631 (10th Dist.1992). In addition, there apparently is no private right of action for a violation of 18 U.S.C. § 3109. *Rivera*

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[18] *See, e.g., Bivens v. Six Unknown Agents,* 403 U.S. 388, 413 (1971) (BURGER, C.J., dissenting).

[19] "Surely a better remedy lies in the civil law for remonstrance of the hypothetically unreasonable behavior related to the taking command than by exclusion of evidence reasonably seized pursuant to a valid warrant."

v. United States, 728 F.Supp. 250 (S.D.N.Y.), *aff'd in part, vacated in part,* 928 F.2d 592 (2d Cir.1990). *A fortiori,* how could a person who is guilty of a crime conceivably expect to have a claim or persuade a jury that their violation of rights is worth any damages?

CONCLUSION

The judgment of the Arkansas Supreme Court should be reversed and the cause remanded.

Respectfully submitted,

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